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ALEXANDER
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No. 80-1344

In the Supreme Court of the United States

OCTOBER TERM, 1980

TRACEY VIEGAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was unlawfully seized when he was briefly questioned by federal narcotics agents.

2. Whether petitioner's Fourth Amendment rights were violated when DEA agents detained his suitcase pending the arrival of a detection dog because they reasonably suspected that the suitcase contained narcotics.

3. Whether the affidavit supporting the issuance of a search warrant established probable cause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 639 F. 2d 42.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on January 8, 1981. The petition for a writ of certiorari was filed on February 9, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioner was convicted of one count of possession of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to two years' imprisonment, with all but six months of that sentence suspended, and to a two-year special parole term. The court of appeals affirmed (Pet. App. 1a-14a).

The evidence adduced at a suppression hearing showed that during the night of November 6-7, 1979, two DEA agents assigned to Logan Airport in Boston, Massachusetts, observed Robert Brooks inquire where luggage from a flight from Miami could be retrieved. After parking his automobile near the luggage claim area, Brooks entered a phone booth, evidently to place a call, but kept the booth door open and nervously peered outside (Pet. App. 1a-2a; Tr. 61-66).[1] When petitioner deplaned, Brooks met him, and the two men entered adjoining phone booths. They kept the phone booth doors open, looking up and down the corridors and appeared to the agents to be talking with one another.[2] The agents, one of whom had 14 years' drug enforcement experience, viewed these actions as "consistent with activity that is displayed by drug couriers * * * to identify surveillance" (Pet. App. 2a; Tr. 66-69, 72-73, 78).

The agents then followed petitioner and Brooks to the baggage carousel and observed them alternately turn and look about as they walked (Pet. App. 2a; Tr. 70-73). Petitioner obtained his suitcase and began walking with Brooks toward the parking lot. At that point one of the agents joined them, identified himself and stated that he wished to speak with petitioner for a moment. Without objection, petitioner answered questions concerning the origin and purpose of his trip and showed the agent his ticket stub and his driver's license (Pet. App. 2a-3a; Tr. 35-40). When one of the agents asked petitioner whether he had drugs in his suitcase, petitioner paled, his hand shook, and he began to perspire although it was a cold night. After petitioner responded in the negative, the agent falsely stated that the

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[1]"Tr." refers to the two volume transcript of the suppression hearing.

[2]The agents testified that neither man put any coins into the phones, although telephone records showed that Brooks made a collect call to his home (Pet. App. 2a & n.1).

DEA had received information from Miami regarding someone seen there matching petitioner's description and carrying a valise.[3] The agent then asked petitioner if he would open his bag but advised him that he need not do so. Petitioner refused to open the bag but agreed to let a detector dog sniff it and then agreed to accompany the agents to the DEA airport office to inquire about a dog. After it developed that no dog would be available for four hours, petitioner was told that he was free to leave, but that his bag would be detained. He then departed, leaving the bag (Pet. App. 3a; Tr. 40-50, 77-80).

Later, the same day, the agents applied for a warrant to search the contents of the bag. In addition to detailing the events of the previous night, the affidavit in support of the warrant application (Pet. App. 18a-20a) also contained additional information revealed by a check of the files. A confidential informant, who had provided information in the past that had been independently corroborated by DEA agents, had advised the DEA that petitioner dealt in cocaine and that the informant had purchased some cocaine from him in 1978. The informant had also reported that he had observed petitioner in 1978 with large quantities of cocaine brought in from Florida. The affidavit also stated that in 1978 the DEA had received information from a local policeman that petitioner was planning to transport a large quantity of cocaine from Florida to Massachusetts. The magistrate issued a search warrant, and the ensuing search revealed 290 grams of cocaine in the luggage (Pet. App. 1a, 6a-7a).

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[3]Petitioner was aware, however, that this information could not have pertained to him because he carried no valise in Miami, having checked it through directly from Marathon, Florida, to Boston (Pet. App. 3a n.2; Tr. 44).

Prior to trial, petitioner moved to suppress this evidence on the ground that he and his suitcase had been detained illegally and that there was no probable cause to support the issuance of the search warrant. After a hearing, the district court denied the motion (Tr. 2-131).

The court of appeals noted (Pet. App. 3a-4a) that it was unclear whether, or when, petitioner was seized by the agents but found it unnecessary to resolve that question because, even assuming that a seizure occurred at the initial contact, "the agents' conduct satisfied the Fourth Amendment's test of reasonableness" (*id.* at 5a). The court also held that the agents' reasonable suspicion of criminal activity provided a sufficient basis to detain petitioner's luggage pending the acquisition of a search warrant (*id.* at 6a). Finally, it held that the "cumulative effect" of the information contained in the affidavit—the agents' observations at the airport together with the information concerning petitioner's cocaine smuggling activities during the preceding year—was sufficient to establish probable cause for issuance of a search warrant (*id.* at 6a-8a). Judge Bownes dissented on the ground that the agents did not have reasonable suspicion sufficient to detain petitioner for a brief investigation (*id.* at 8a-14a).

ARGUMENT

1. Petitioner contends (Pet. 12-15) that the DEA agents violated his Fourth Amendment rights by seizing him without reasonable grounds to suspect him of criminal activity. This contention is without merit. The court of appeals correctly decided this issue, and, in any event, this fact-bound issue does not warrant review by this Court.

Law enforcement officials are empowered to conduct brief investigatory stops where there is "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *United States* v. *Cortez*, No. 79-404 (Jan. 21, 1981), slip op. 5. See also, *e.g.*, *United*

States v. *Brignoni-Ponce*, 422 U.S. 873, 878-883 (1975); *Terry* v. *Ohio*, 392 U.S. 1, 16-19 (1968). The totality of the circumstances is to be taken into account in determining whether the officers have a reasonable basis for suspicion. *United States* v. *Cortez, supra*, slip op. 6. And in making this determination, law enforcement officers are entitled to assess the facts in light of their specialized knowledge and experience, which may permit them to make deductions that would elude an untrained observer. *Ibid.*; *Brown* v. *Texas*, 443 U.S. 47, 52 n.2 (1979).

Under these principles, assuming *arguendo* that petitioner was seized when first contacted by the agents, their observations provided reasonable suspicion of criminal activity sufficient to justify a brief investigatory stop, as both courts below held. Prior to their encounter with petitioner, the agents overheard Brooks inquire concerning the arrival of a flight from Miami, which is known to be a major source of cocaine. They observed Brooks peer nervously up and down the concourse while appearing to place a call from a phone booth. When Brooks met petitioner, both men repeated this apparent effort to detect surveillance by using adjacent phone booths as lookout posts from which to survey the concourse, while appearing to talk with each other rather than on the phone. When the two men proceeded toward the luggage area, they took turns looking behind them several times "as though they were looking for somebody" in a manner that the agents had seen used before by drug couriers in an attempt to detect surveillance (Tr. 69).[4] Here, the circumstances of a late night arrival from Miami, while not grounds for particularized suspicion in

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[4]The experience of trained agents comes into play particularly in recognizing the "characteristics of persons engaged in * * * illegal practices" and "the behavior of a suspect who appears to be evading police contact." See *United States* v. *Mendenhall*, 446 U.S. 544, 563-564 (1980) (Powell, J., concurring).

and of itself, heightened the possibility that a drug delivery was taking place. When the agents observed petitioner and Brooks engage in series of activities that indicated an attempt to detect surveillance, their suspicious were raised to a level that justified the minimal intrusion involved here.[5]

In any event, we submit that petitioner was not "seized" within the meaning of the Fourth Amendment when he was first contacted by the agents. Although they declined to decide the question, both the majority (Pet. App. 3a-4a) and the dissent (*id.* at 8a) recognized that it was not clear that a seizure occurred here, and the majority explicitly rejected the district court's intimation that a seizure within the meaning of the Fourth Amendment occurs simply because a policeman can reasonably expect a citizen to stop when a question is posed to him. As explained in *United States* v. *Mendenhall*, 446 U.S. 544, 553 (1980) (opinion of Stewart, J.), "a person is 'seized' only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards." See also *Terry* v. *Ohio*, *supra*, 392 U.S. at 19 n.16; *Sibron* v. *New York*, 392 U.S. 40, 63 (1968).

Here, as in *Mendenhall*, the agents' initial approach to petitioner would not have led a reasonable person to believe that he was not free to leave. The agents had no uniforms or

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[5]Petitioner mistakenly contends (Pet. 15), that *Reid* v. *Georgia*, No. 79-448 (June 30, 1980), compels the conclusion that the agents lacked reasonable suspicion here. As in this case, the suspects in *Reid* arrived on a late night flight from a major narcotics source city. But here, as the court of appeals noted (Pet. App. 6a n.5), the agents observed petitioner and Brooks make several different suspicious attempts to detect surveillance, both while walking in the concourse and while sitting in the adjoining phone booths. In *Reid*, by contrast, petitioner occasionally looked backward at his companion, but there was no evidence that he ever took any actions calculated to detect surveillance.

weapons and made no effort to detain petitioner. An agent simply joined petitioner and Brooks as they were walking down the concourse, requested "a moment" to talk with them, and asked for identification. Petitioner complied with this request without any objection and voluntarily responded to questions concerning his identity, his point of origin and the purpose of his trip. "In short, nothing in the record suggests that [petitioner] had any objective reason to believe that [he] was not free to end the conversation in the concourse and proceed on [his] way * * *." *United States* v. *Mendenhall, supra*, 446 U.S. at 555 (opinion of Stewart, J.); see also *United States* v. *Elmore*, 595 F. 2d 1036, 1042 (5th Cir. 1979), cert. denied, 447 U.S. 910 (1980); *United States* v. *Wylie*, 569 F. 2d 62, 68 (D.C. Cir. 1977).[6]

The court of appeals suggested that the protections of the Fourth Amendment may have been implicated when the agents asked petitioner to accompany them to the DEA office without returning his driver's license, referring to this event as "a possible watershed point in the seizure question" (Pet. App. 4a n.3). Assuming that the seizure occurred at this point,[7] the agents had by then acquired additional grounds for suspicion sufficient to detain petitioner briefly for investigative purposes, as a result of petitioner's extremely nervous reaction to the agents' questions about drugs. In short, the agents' encounter with petitioner did not violate his Fourth Amendment rights.

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[6]The agent testified at the suppression hearing that, if petitioner had refused to stop, he would have been permitted to continue on his way with his luggage (Tr. 42).

[7]Petitioner voluntarily agreed to go to the office. While he would not wish to leave the airport without his driver's license (cf. *United States* v. *Elmore*, *supra*, 595 F. 2d at 1042), there is no reason why petitioner should not have felt free to inform the officer that he wished to leave and to request the return of his license.

2. Petitioner's contention (Pet. 16-20) that his Fourth Amendment rights were violated by detention of his luggage overnight pending further investigation and issuance of a search warrant is similarly without merit. The agents acted reasonably at all times and performed no search at all until a search warrant had been secured.

In *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), this Court held that police were authorized to detain briefly mail packages reasonably suspected of containing contraband. When additional information established probable cause, the agents secured a warrant and searched the packages. Noting that the circumstances that gave rise to the police's suspicion "certainly justified detention, without a warrant, while an investigation was made" (397 U.S. at 252), the Court explained (*id.* at 252-253):

> The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures."
>
> * * * * *
>
> The significant Fourth Amendment interest was in the privacy of this first-class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

Similarly here, petitioner's privacy interest in the contents of his luggage was not invaded until a search warrant was obtained from a magistrate. Given the agents' reasonable suspicion that the suitcase contained narcotics, they acted reasonably in detaining it overnight in order to obtain a detection dog and for further investigation; the alternative would have been to allow petitioner to dispose of the contraband. The limited inconvenience to petitioner of having

his luggage detained for a few hours was justified, as in *Van Leeuwen*, by the facts that gave rise to the agents' suspicion. See *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.12 (1979).[8] As petitioner recognizes (Pet. 16), the Seventh Circuit has held on facts indistinguishable from those here that police may detain a suitcase for further investigation when they reasonably suspect that it contains contraband. *United States* v. *Klein*, 626 F. 2d 22, 25-26 (1980). As the court of appeals explained in *Klein*, the privacy interest in the contents of the suitcase was not invaded by the detention but rather was safeguarded by obtaining a warrant before the search. 626 F. 2d at 26. See also *United States* v. *Chadwick*, 433 U.S. 1, 13-14 n.8 (1977); *United States* v. *Benjamin*, No. 80-2143 (7th Cir. Mar. 26, 1981), slip op. 6-9.[9]

3. There is likewise no merit to petitioner's contention (Pet. 20-34) that the affidavit was insufficient to support the issuance of a warrant to search the suitcase. As the court of appeals concluded (Pet. App. 8a), "the cumulative effect [of the agents' observations and the information furnished during 1978 by the informant] was to establish probable cause to search [petitioner's] bag." The district court, the majority

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[8]Petitioner was not in the midst of a journey, but was simply going home from the airport. He was told that he could pick up his bag after it had been sniffed by a dog (Tr. 47).

[9]Neither *Chadwick* nor *Arkansas* v. *Sanders*, *supra*, lends support to petitioner's claim. Both cases concern the requirement of a warrant for the greater intrusion of examining the contents of luggage. The agents complied with that requirement here. Indeed, both *Chadwick* and *Sanders* clearly suggest that police may maintain the status quo through temporary detention of unopened luggage while seeking a search warrant. *United States* v. *Chadwick*, *supra*, 433 U.S. at 13-14; *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764 n.12. Similarly, the agents fully complied with *Dunaway* v. *New York*, 442 U.S. 200 (1979). Because such an extended detention of a person would be unreasonable in the absence of probable cause, petitioner was allowed to go home when the luggage was detained. Since this case does not involve detention of petitioner's person, there is no need to hold it pending disposition of *Michigan* v. *Summers*, No. 79-1794 (argued Feb. 25, 1981).

and the dissent below all agreed on this fact-bound conclusion, and review by this Court is accordingly unwarranted.

In particular, petitioner contends (Pet. 21-27) that the affidavit did not comply with the requirements of *Spinelli* v. *United States*, 393 U.S. 410 (1969), and *Aguilar* v. *Texas*, 378 U.S. 108 (1964), because it failed to disclose the reason why the agent concluded that the informant was reliable and the basis upon which the informant determined that petitioner had been involved in trafficking in cocaine. But the affiant's statement (Pet. App. 20a) that the informant had previously furnished the DEA with reliable, independently corroborated information fully satisfied the reliability component of the *Aguilar* test. See, *e.g.*, *United States* v. *Dominguez*, 615 F. 2d 1093, 1096 (5th Cir. 1980); *United States* v. *Muckenthaler*, 584 F. 2d 240, 244 (8th Cir. 1978); *United States* v. *Louderman*, 576 F. 2d 1383, 1389 (9th Cir.), cert. denied, 439 U.S. 896 (1978).[10] And the informant's statement (Pet. App. 20a) that he had purchased cocaine from petitioner and had observed him with large quantities of cocaine brought in from Florida clearly established that the information was based on the informant's personal knowledge. See, *e.g.*, *United States* v. *Harris*, 403 U.S. 573, 578-579 (1971) (plurality opinion).[11]

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[10]Moreover, the fact that the informant's admission that he had purchased cocaine from petitioner was against his penal interest furnished an additional basis for crediting his tip. See, *e.g.*, *United States* v. *Harris*, 403 U.S. 573, 583 (1971) (plurality opinion); *United States* v. *Dunloy*, 584 F. 2d 6, 10 (2d Cir. 1978).

[11]The affidavit did not specifically state how the informant knew that the cocaine he observed in petitioner's possession came from Florida. But considering the affidavit as a whole, the clear implication of the informant's statements that he purchased cocaine from petitioner and observed cocaine in his possession was that he also learned the source of the cocaine as a result of his personal contacts with petitioner. In addition, the informant's statement that Florida was the source of the cocaine he observed was corroborated by other information in the affidavit that the local police had learned from an unidentified source that petitioner was planning to transport cocaine from Florida to Massachusetts.

Contrary to petitioner's contention (Pet. 28-33), the fact that the informant's knowledge of petitioner's drug dealings was a year old does not mean that it should not be considered in deciding whether the affidavit established probable cause. While it is true that the affidavit supporting the search warrant must establish probable cause at the time of the search (see, *e.g.*, *Sgro* v. *United States*, 287 U.S. 206, 210 (1932)), that requirement was satisfied here. The function of the 1978 information was not directly to furnish probable cause that petitioner was carrying cocaine in the airport on November 6, 1979, but to corroborate the agents' deductions based upon their observations of petitioner at that time. The agents' independent observations of petitioner's suspicious behavior gave them reason to suspect that he was smuggling narcotics. The subsequent discovery that petitioner was known to have dealt in cocaine in the recent past raised this suspicion to the level of probable cause.

Finally, petitioner's contention (Pet. 33-34) that the affidavit failed to demonstrate any nexus between his suitcase and the cocaine he was suspected of transporting is without foundation. "In considering the sufficiency of an affidavit of probable cause, only the probability of finding the described items at a particular location must be shown. Certainty is not required." *United States* v. *Moreno*, 569 F. 2d 1049, 1053 (9th Cir.), cert. denied, 435 U.S. 972 (1978). Here, the suitcase was the only item petitioner was carrying when he proceeded out of the terminal, its retrieval at the baggage carousel was accompanied by apparent efforts to detect police surveillance, and petitioner appeared extremely nervous while awaiting a detection dog who would sniff the suitcase for contraband. These facts fully supported the conclusion that the cocaine petitioner was suspected of transporting was probably contained in the suitcase.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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